STATE OF MICHIGAN

COURT OF APPEALS

AMIRA SHKEMBI, Personal Representative of the Estate of MIRANDA SHKEMBI,

Plaintiff-Appellant,

v

RYAN DAVID NILSON, CHERYL ANN NILSON, and JOHN MAICKI,

Defendants-Appellees.

UNPUBLISHED
November 10, 2005

No. 255364
Oakland Circuit Court
LC No. 02-041302-NI

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants' motions for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's decedent attempted to cross Maple Road in Troy outside established crosswalks during a weekday afternoon during rush hour. She successfully crossed the eastbound lanes and stopped in the center left-turn lane. It was plaintiff's theory that defendant Maicki, who had stopped, signaled for decedent to continue across the road without ascertaining that it was safe for her to do so. As decedent entered the outside westbound lane, she was struck by a vehicle driven by defendant Ryan Nilson. The trial court dismissed the action, finding that plaintiff had failed to prove "the required elements of duty and causation against both defendants."

We review a trial court's ruling on a motion for summary disposition de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence and must give the benefit of any reasonable doubt to the nonmoving party. *Id.*

We agree that the trial court erred to the extent it held that neither defendant owed a duty to plaintiff's decedent. Apart from any statutory duty, a driver owes a duty to other motorists and pedestrians to exercise ordinary and reasonable care and caution in the operation of his car. *Zarzecki v Hatch*, 347 Mich 138, 141; 79 NW2d 605 (1956); *Poe v Detroit*, 179 Mich App 564,

571; 446 NW2d 523 (1989). In addition, a driver who signals to a pedestrian or another motorist to proceed when it is not safe to do so may be held liable in tort for negligent performance of an assumed duty. *Sweet v Ringwelski*, 362 Mich 138; 106 NW2d 742 (1961); *Lindsley v Burke*, 189 Mich App 700; 474 NW2d 158 (1991). Contra *Peka v Boose*, 172 Mich App 139, 143; 431 NW2d 399 (1988). Nevertheless, the trial court properly dismissed the action.

A driver is not required "to guard against every conceivable result, to take extravagant precautions, to exercise undue care," and is "entitled to assume that others using the highway in question would under the circumstances at the time use reasonable care themselves and take proper steps to avoid the risk of injury." *Hale v Cooper*, 271 Mich 348, 354; 261 NW 54 (1935). Thus, a driver who is driving in a lane in which he has a right to be and is not aware of a pedestrian's presence is not required to anticipate that a pedestrian will suddenly appear in his path. *Houck v Carigan*, 359 Mich 224, 227; 102 NW2d 191 (1960). If a motorist fails to observe a pedestrian who is able to be seen coming into his path and the motorist fails to stop when he is capable of doing so, a case of negligence is made out. *Johnson v Hughes*, 362 Mich 74, 77-78; 106 NW2d 223 (1960).

In this case, there was no evidence that decedent was visible to Nilson or that he saw her before she ran into his path. Plaintiff's expert agreed that under such circumstances, there was nothing Nilson could have done to avoid a collision regardless of his speed. In addition, both experts agreed that decedent was at fault and Nilson was not and, pursuant to MCL 500.3135(2)(b), "damages shall not be assessed in favor of a party who is more than 50% at fault." Therefore, the trial court did not err in granting judgment for defendants Nilson.

Regarding defendant Maicki, there was sufficient evidence to create a question of fact whether he made a gesture to decedent. Normally, "the question whether, by his hand motion, defendant was signaling his intention to waive his right of way or was signaling that all was clear ahead is a factual issue for the jury to resolve." *Lindsley, supra* at 705. Nevertheless, to prove negligence, a plaintiff must establish not only a breach of duty owed by the defendant, but that the defendant's breach of duty was both a factual and legal cause of the plaintiff's injuries. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). In this case, there is no evidence that decedent observed Maicki's alleged gesture or that she relied upon it in continuing across the road and thus only speculation would enable the trier of fact to determine that defendant's alleged gesture was a cause in fact of decedent's death. "[C]ausation theories that are mere possibilities or, at most, equally as probable as other theories does not justify denying defendant's motion for summary judgment." *Id*. at 172-173.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Patrick M. Meter